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No. 91-637

In the Supreme Court of the United States

OCTOBER TERM, 1991

WILLIAMS TILE & TERRAZZO COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board abused its discretion in denying petitioner's motion for reconsideration to review a contention that could have been, but was not, made during the course of the administrative proceedings.

2. Whether substantial evidence supports the Board's finding that petitioner did not have a good faith doubt concerning the union's majority support among the unit employees.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 935 F.2d 1249. The decision and order of the National Labor Relations Board (Pet. App. 25a-105a) are reported at 287 N.L.R.B. 769.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 1991. The petition for a writ of certiorari was filed on October 15, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner Williams Tile & Terrazzo Co. installs tile, terrazzo, and related products. Its employees have been represented for approximately 20 years by Tile, Marble & Terrazzo Finishers & Shopmen, Local Union No. 167 (the Union). In 1983, petitioner and U.S. Mosaic Tile Co. formed the Tile, Terrazzo & Marble Contractors Association of Atlanta and Vicinity (the Association) for the purpose of representing the two companies in collective bargaining with the Union. The Association recognized the Union as the collective bargaining representative of all employees of its two member companies who performed work traditionally considered to be within the Union's work jurisdiction, and it entered into a two-year collective bargaining agreement with the Union effective from October 1, 1983 to September 30, 1985. Pet. App. 2a, 43a-44a.

In mid-August 1985, the Association and the Union began negotiations for a new contract. The negotiations were not fruitful, and on November 19, the unit employees began an economic strike. Thereafter, petitioner and Mosaic discontinued making contributions to the Union's pension and welfare funds. On November 24, 35 of petitioner's employees and 19 or 20 of Mosaic's employees returned to work. Pet. App. 3a, 45a-47a.

On December 20, 1985, the Union wrote to Kenneth Williams, petitioner's president and the Association's chairman, and agreed to accept the Association's last contract offer, subject to ratification by the unit employees. The Union also made an unconditional offer to return to work on behalf of the remaining strikers. Williams did not respond to the letter. When the Union finally reached him on January 3, 1986, Wil-

liams stated that he doubted that the Union represented a majority of the employees. No further bargaining occurred, and the Association did not respond to the Union's second letter of January 28, 1986, reiterating its acceptance of the Association's last contract offer. Pet. App. 55a-57a, 85a-86a.

2. The Union filed unfair labor practice charges with the Board. Pet. App. 40a-42a. The Board found, in agreement with the administrative law judge (ALJ), that the Association, petitioner and Mosaic violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by unilaterally ceasing to make contributions to the Union's benefit funds and by refusing to recognize and bargain with the Union. Pet. App. 26a, 92a-94a.[1]

At the hearing, Williams testified that he withdrew recognition of the Union on January 3, 1986, after having "reached a 'fixed' position the first week of January that the Union did not represent a majority based on the petition [signed by 28 employees who expressed lack of support for the Union], 'rumblings through the shop,' and the strikers who crossed the picket line to return to work." Pet. App. 89a-90a.[2]

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[1] The Board also found, in agreement with the ALJ, that the Association, petitioner and Mosaic violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158(a)(3) and (1), by refusing to reinstate certain striking employees and delaying the reinstatement of others. Pet. App. 26a, 97a-98a. The court of appeals affirmed the Board's findings on those issues, *id.* at 23a-24a, and they are not involved here.

[2] The ALJ rejected petitioner's reliance on two other petitions—one signed by six of its employes and the other signed by nine of Mosaic's employees—because they had not been received at the time petitioner or Mosaic expressed doubt about the Union's support. Pet. App. 88a-89a, 91a, 92a. The

In rejecting petitioner's assertion of a good faith doubt that the Union continued to represent a majority of the unit employees, the ALJ pointed out that Williams' evidence concerned only his own employees, and that Williams conceded that he did not know whether the Union maintained its majority status in the Association-wide unit.[3] The ALJ pointed out that the 28 employees listed on the timely petition did not comprise even a majority of Williams' 75-plus employees, much less the 100-plus employees in the combined bargaining unit. Pet. App. 93a. And the Board, citing its decision in *Buckley Broadcasting Corp.*, 284 N.L.R.B. 1339 (1987), noted that petitioner had "not proffered sufficient evidence" that the returning strikers had repudiated support for the Union and therefore had not "rebutted the overall presumption of continuing majority status." Pet. App. 26a-27a n.2.

ALJ found that "[t]he second Williams petition could not have been received by [petitioner] until several months [after the first week in January], and the Mosaic petition was received by that Company, if at all, subsequent to the refusal to bargain." *Id.* at 93a. Williams could identify only four employes who he heard had expressed dissatisfaction with the Union, and he was aware that all four had signed the 28-employee petition. Tr. 227.

[3] The ALJ found (as the unfair labor practice complaint alleged and petitioner admitted in its answer) that the appropriate unit for assessing majority status was the combined unit of petitioner's and Mosaic's employees. Pet. App. 93a. The ALJ further found that the total employee complement on January 3, 1986, was in excess of 100, consisting of more than 75 individuals employed by petitioner and 30 employed by Mosaic. *Ibid.* In so finding, the ALJ rejected petitioner's argument that only 40 of the employes on its payroll during the relevant period were unit employes. *Id.* at 47a-50a, 89a.

The Board's decision issued on December 16, 1987. On January 28, 1988, petitioner moved for reconsideration in light of *John Deklewa & Sons, Inc.*, 282 N.L.R.B. 1375 (1987), enforced *sub nom. International Ass'n of Bridge Workers, Local No. 3* v. *NLRB*, 843 F.2d 770 (3d Cir.), cert. denied, 488 U.S. 889 (1988), which altered the Board's approach to those bargaining relationships in the construction industry that are based on Section 8(f) of the Act, 29 U.S. 158(f), rather than Section 9(a), 29 U.S.C. 159(a).[4] The Board denied the motion for reconsideration. Pet. App. 106a-109a. It noted that *Deklewa* issued on February 20, 1987, at

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[4] Section 8(f) of the Act authorizes employers and unions in the construction industry to enter into exclusive bargaining agreements before an employee complement is hired and without regard to the union's majority status. Prior to *Deklewa*, the Board held that a Section 8(f) bargaining relationship could be repudiated by either party, at any time and for any reason; however, if the union gained majority status among the employees in the unit, the relationship would "convert" to a conventional bargaining relationship under Section 9(a), and the union would thenceforth gain the benefit of the presumption of continuing majority support accorded to such a relationship. See *Deklewa*, 282 N.L.R.B. at 1378-1379. In *Deklewa*, the Board rejected the doctrine of conversion; instead, it held that the Section 8(f) agreement is enforceable during its term, but held that either party could repudiate the relationship upon expiration of the agreement unless the union had been certified as the majority representative in a Board election or the employer had voluntarily recognized the union based on an affirmative showing of majority support. 282 N.L.R.B. at 1377-1378, 1385, 1387 n.5.

If *Deklewa* applied to this case—and if the expired contract between the Association and the Union in this case was a Section 8(f) contract—the Union would not have been entitled to a presumption of majority support when petitioner refused recognition. The Union instead would have been required to establish its support among the unit employees.

a time when this case was still pending before the ALJ, yet petitioner and the other respondents before the Board did not raise a Section 8(f) defense before the ALJ and did not refer to *Deklewa* or identify any issue under Section 8(f) in their exceptions to the ALJ's March 25, 1987, decision. Instead, the Board noted, petitioner and the other Board respondents had continued throughout the pendency of proceedings before the Board to defend their withdrawal of recognition on the distinct ground that the Union had lost its majority status, and "found it appropriate to assert the [*Deklewa*] defense * * * only *after* the issuance of an unfavorable [Board] Decision and Order." Pet. App. 108a. The Board rejected the assertion that its decision to apply *Deklewa* retroactively to "all pending cases at whatever stage of litigation" (*Deklewa*, 282 N.L.R.B. at 1389) required it, *sua sponte*, to examine whether a presumption of majority status was appropriate in this case.[5]

3. The court of appeals enforced the Board's order. Pet. App. 1a-24a. Initially, the court sustained the Board's position that the "assertion of section 8(f) issues in this case constituted an affirmative defense, and, as such, should have been presented at the first feasible stage after *Deklewa* issued." Pet. App. 17a. The court further found that the Board had not abused its discretion by refusing to consider the *Deklewa* issue for the first time on petitioner's motion

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[5] The Board distinguished *Ron E. Savoia Construction Co.*, 289 N.L.R.B. 200 (1988), noting that when *Deklewa* issued, that case was pending on exceptions to the Board that arguably raised the defense that the union enjoyed only a Section 8(f) relationship when the employer withdrew recognition. Pet. App. 108a n.3.

for reconsideration. *Id.* at 18a. The court explained (*id.* at 15a n.10):

> Although it is possible that in some cases the Board should apply [Section] 8(f) absent a Section 8(f) argument by either party, the facts of this case do not warrant such a conclusion. Both the Employers and the Board originally considered this case to be governed by [Section] 9(a). This dispute could reasonably be seen as a Section 9(a) dispute, and we do not read the facts to indicate that the Board was compelled to recognize the possible application of [Section] 8(f). It was therefore up to the parties to raise [Section] 8(f) in this case.

Accordingly, the court agreed with the Board that its policy of applying *Deklewa* retroactively did not require the Board, *sua sponte*, to consider whether the bargaining relationship in this case was governed by Section 8(f), rather than Section 9(a), in the absence of a claim that a Section 8(f) relationship existed. Pet. App. 13a-15a & n.10.

Next, the court found that the Board's findings on the refusal-to-bargain issue were supported by substantial evidence. The court noted that there was no issue here "regarding whether the Union in fact had lost majority status. The sole issue presented * * * by petitioner[] regarding the refusal to bargain is simply whether the Board incorrectly ignored the totality of the evidence supporting the Employers' good faith belief that majority status had been lost." Pet. App. 20a. Citing its own prior decision in *Bickerstaff Clay Products Co.* v. *NLRB*, 871 F.2d 980 (11th Cir.), cert. denied, 493 U.S. 924 (1989), the court rejected petitioner's reliance on the abandonment of the strike by a number of strikers, stating that "[s]trikers re-

turning to work can only support a good faith belief of lost majority when combined with other evidence." Pet. App. 21a. Here, the court found that, "even when combined," the factors relied upon by petitioner —the return of the striking employees, the petitions, and the "rumblings through the shop"—were insufficient to support a claim of good faith doubt of majority status. *Id.* at 21a-22a.

ARGUMENT

After a collective bargaining agreement has expired, a union that has been selected in a Board-conducted election or voluntarily recognized based on a showing of majority support enjoys a rebuttable presumption of continuing majority support. An employer can rebut the presumption and lawfully withdraw recognition only by demonstrating that, on the date recognition was withdrawn, (1) the union, in fact, had lost the support of a majority of the bargaining unit employees, or (2) the employer had a good faith doubt, based on objective considerations, of the continued existence of majority support for the union. *NLRB* v. *Curtin Matheson Scientific, Inc.*, 110 S. Ct. 1542, 1549-1550 (1990). However, as noted above (see note 4, *supra*), under the Board's rule in *Deklewa*, no presumption of majority support exists at the expiration of a collective agreement entered into pursuant to Section 8(f) of the Act. Petitioner challenges both the Board's finding that it did not have a good faith doubt of the Union's majority support and the Board's refusal to reconsider the case under *Deklewa* to ascertain whether the expired agreement was a Section 8(f) contract. No issue warranting review by this Court is raised by either challenge. The court of appeals correctly concluded

that the Board's factual findings are supported by substantial evidence, and its decision does not conflict with any decision of this Court or of another court of appeals.

1. In *Deklewa*, the Board determined to apply retroactively "to all pending cases in whatever stage" its new policy that either party to a Section 8(f) agreement could repudiate the relationship at the expiration of the agreement, unless the union had been recognized based on a demonstration of majority support. 282 N.L.R.B. at 1399. Petitioner contends (Pet. 14-18) that the Board failed to follow its own rule in declining to review this case under *Deklewa* since it was still pending before the Board when petitioner filed its motion for reconsideration. However, the Board, upheld by every court that has reviewed the matter, has held that it will consider the issue whether the employer's relationship with the union is governed by Section 8(f) only if that issue is timely raised in a pending case. *Yorkaire, Inc.*, 297 N.L.R.B. No. 58 (Nov. 30, 1989), slip op. 2, enforced, 922 F.2d 832 (3d Cir. 1990) (Table) (*Deklewa* issue not timely where it could have been raised at ALJ hearing, but was raised for first time in exceptions to Board); *Howard Electrical* v. *Mechanical, Inc.*, 293 N.L.R.B. 472, 473 n.5 (1989), enforced, 931 F.2d 63 (10th Cir. 1991) (Table) (*Deklewa* issue not timely where not raised before ALJ or in exceptions to Board); *White-Evans Service Co.* v. *NLRB*, 285 N.L.R.B. 81 (1987), slip op. 10-11, enforced, 886 F.2d 333 (7th Cir. 1989) (Table) (Board did not abuse its discretion by denying employer's motion for reconsideration of a decision issued five months after *Deklewa*, where employer, as here, failed to raise the issue until after an unfavorable Board decision). See

also *Fox Painting Co.* v. *NLRB*, 919 F.2d 53, 56 (6th Cir. 1990) (Board properly declined to apply *Deklewa* retroactively where raised for first time in compliance proceedings); *Corson and Gruman Co.* v. *NLRB*, 899 F.2d 47, 49-50 (D.C. Cir. 1990) (untimely motion for reconsideration).[6]

The court below correctly concluded that it was "entirely reasonable" (Pet. App. 19a) for the Board to require the parties to present their arguments on the applicability of *Deklewa* to the Board at the first feasible stage after *Deklewa* was decided. This rule "promotes the agency's fair and efficient administration of the Act" by avoiding "the sandbagging effect of one party waiting to see if a decision is favorable and then, if it is not, raising new arguments." *Ibid.*

Moreover, as the court below further concluded, "the Board's application of this rule in this case [did not constitute] an abuse of discretion" (Pet. App. 19a): petitioner could have raised its Section 8(f) claim with the ALJ before whom the case was pending when *Deklewa* issued, or with the Board in its exceptions to the ALJ's decision. Petitioner, however, waited to raise the issue until after it had lost under the alternative theory it presented to the Board. The court below properly sustained the Board's refusal to entertain petitioner's effort to raise the issue at that

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[6] Petitioner's assertion (Pet. 16-17) that the Board did not follow that policy in *Ron E. Savoia Construction Co.*, 289 N.L.R.B. 200 (1988), is incorrect. As the Board explained in *Yorkaire*, slip op. 3 n.3, and in this case, Pet. App. 108a n.3—and as the court below reiterated, *id.* at 16a-18a—*Savoia* was pending on exceptions arguably raising an 8(f) issue when *Deklewa* issued, and *Deklewa* was brought to the Board's attention at the first possible stage of the litigation.

point.[7] The Board's regulations governing reopening, which were issued pursuant to its discretionary reopening authority under Section 10(d) of the Act, 29 U.S.C. 160(d), provide that a motion to reopen be based on "extraordinary circumstances" and must be filed within 28 days of the Board's decision. 29 C.F.R. 102.48(d)(1) and (2). Petitioner cites no "extraordinary circumstances" that warranted reopening to allow a belated presentation of the *Deklewa* issue.

Finally, and contrary to petitioner's assertion (Pet. 15), it is not true that the expired collective agreement here "is indisputably a section 8(f) agreement." The Union had a relationship with petitioner for more than 20 years; if petitioner had voluntarily recognized the Union during that period based on a showing of majority support, the expired collective agreement would not be a Section 8(f) agreement, but a Section 9(a) agreement, which gives rise to a presumption of majority support. Although Section 8(f) agreements are *permissible* in the construction industry, it does not follow that every agreement in that industry actually *is* such an agreement. Thus, the fact that petitioner was in the construction industry does not suggest that the Board should have raised the *Deklewa* issue *sua sponte*.

For the foregoing reasons, and in light of the uniform appellate rulings cited above, the manner in

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[7] As this Court has repeatedly held, a court may not order reopening of administrative proceedings except "in the most extraordinary circumstances," *INS* v. *Abudu*, 485 U.S. 94, 107 n.11 (1988) (quoting *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 296 (1974)), upon "a showing of the clearest abuse of discretion." *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 535 (1946).

which the Board resolved the question in this case concerning the retroactive application of its own *Deklewa* decision does not present any issue of continuing importance warranting review by this Court.

2. Petitioner contends that, in finding that it had no good faith doubt of the Union's majority status, the Board and the court of appeals failed to assess the totality of the evidence (Pet. 18-21), required petitioner to establish the Union's actual loss of majority support rather than only a good faith doubt about such loss (Pet. 21-24), and improperly evaluated the impact on majority status of replacement workers (Pet. 24-29). There is no merit to any of these contentions.

a. The court of appeals expressly found (Pet. App. 21a-22a) that "even when combined," the factors relied upon by petitioner did not establish a good faith doubt. Petitioner simply quarrels with that conclusion, asserting (Pet. 18-20) that the return of striking employees, the 28 signatures on the petition, informal expressions of anti-Union sentiment, subsequent petitions, and the Union's cessation of the strike, supported its assertion of a good faith doubt. This contention—as petitioner acknowledges in urging this Court to "determine that the Board's finding is not substantially supported by the evidence as a whole" (Pet. 23)—raises only an evidentiary issue, which is not appropriate for further review. *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

In any event, there was ample support for the Board's finding, which the court below upheld, that the factors cited by petitioner were not sufficient to establish a good faith doubt of the Union's majority status. As the court below pointed out, the fact that a majority of the strikers returned to work within a

few days of the strike does not itself reflect a rejection of the Union. Moreover, the petition that petitioner subsequently received listed the names of only 28 employees in a multi-employer unit of more than 100 employees, and the two other petitions signed by 15 additional employees were received only after the withdrawal of recognition. Finally, the oral statements by some employees, which amounted to "rumblings through the shop," were too vague to support a good faith belief that the Union had lost majority support. Pet. App. 21a.

Petitioner's reliance (Pet. 20) on the Eleventh Circuit's own prior decision in *Bickerstaff Clay Products Co.* v. *NLRB*, 871 F.2d 980, cert. denied, 493 U.S. (1989), does not present an issue for this Court to resolve, *Wisniewski* v. *United States*, 353 U.S. 901 (1957), and is in any event misplaced. In *Bickerstaff*, the court of appeals acknowledged that "an employee's return to work during a strike does not by itself provide a reasonable basis for presuming that he has repudiated the Union as a bargaining representative." 871 F.2d at 988. Nor does the fact that substantial numbers of employees have resigned from the union. *Id.* at 989. However, in the circumstances of that case, which included picket line violence, breakdown of union leadership, union dormancy, and dissatisfaction with the union evidenced by unfair labor practice charges filed by employees against the union (*id.* at 986-987, 989, 993), the court held that there was "a composite showing of objective evidence" establishing a good faith doubt. *Id.* at 994. No such showing was made here. There was no strike violence; the Union was active and visible at the time petitioner withdrew recognition; and the 28 employees who signed the anti-Union petition were considerably

less than a majority of petitioner's own employees, much less the combined unit.

b. Petitioner asserts (Pet. 22-23) that the Board's rejection of its reliance on the 28 signatories on the decertification petition because they constituted less than a majority of the unit employees shows that it was required to establish that the Union had actually lost majority status, rather than that petitioner had a good faith doubt on that score. This contention is meritless. In *Curtin Matheson*, the Court explained that "[t]he Board's requirement of some objective evidence indicating replacements' opposition to the union does not amount to a requirement that the employer prove that the union *in fact* lacks majority status. To show a good-faith doubt, an employer may rely on circumstantial evidence; to show an actual lack of majority support, however, the employer must make a numerical showing that a majority of employees in fact oppose the union." 110 S. Ct. at 1550 n.8. Thus, while petitioner did not have to show that a majority of the employees had signed a decertification petition, it did have to show by circumstantial evidence a reasonable basis for believing that a majority of the employees no longer supported the Union. Petitioner did not meet that requirement by making a numerical showing with respect to significantly *less* than a majority of the unit employees.[8]

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[8] There also is no merit to petitioner's passing assertion (Pet. 23) that the Union in fact did not represent a majority of the employees. Petitioner relies on the two petitions received after it withdrew recognition and on a calculation of the number of unit employees that was expressly rejected by the ALJ (Pet. App. 47a-50a). Its assertion simply takes issue with the Board's and the court of appeals' rejection of its evidence in those regards. As the court of appeals correctly

c. Finally, petitioner contends (Pet. 24-29) that the Board did not take into account the "large contingent of replacement workers." This contention simply takes issue with the Court's decision in *Curtin Matheson*, which upheld the Board's rule that, in determining whether an employer has a reasonable basis for doubting a union's majority status, no presumption is warranted as to whether or not striker replacements support the union. Petitioner suggests no reason why the Court should depart from the doctrine of *stare decisis* and overrule its recent decision in *Curtin Matheson*—and, indeed, petitioner does not urge the Court to do so. See Pet. i, 29.

That issue would not be properly presented here in any event. Before the Board, none of the respondents raised any issue concerning replacement employees, as distinguished from returning strikers, in seeking to show that they had a good faith doubt as to the Union's majority status.[9] Section 10(e) of the Act, 29 U.S.C. 160(e), provides that "[n]o objection that has not been urged before the Board * * * shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." Petitioner demonstrated no "extraordinary circumstances" that would excuse

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noted (*id.* at 20a), there was no issue here "regarding whether the Union in fact had lost majority status."

[9] Before the court of appeals, petitioner, for the first time in its reply brief, argued (at 12-13) that "[t]here is no evidence that the replacements would support the Union and, because [the court of appeals] has rejected any such presumption, for purposes of determining a majority the number of unit employes should be reduced by the number of employees 'inferred' by the ALJ to be replacements." The court of appeals did not respond to that new argument.

its failure here. Accordingly, the issue is not properly presented. *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982); *Detroit Edison Co.* v. *NLRB*, 440 U.S. 301, 311 & n.10 (1979).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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